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SENATE BILL 464

53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

INTRODUCED BY

George K. Munoz and Ron Griggs

AN ACT

RELATING TO HIGHER EDUCATION; ENACTING THE PUBLIC-PRIVATE PARTNERSHIPS ACT; ALLOWING THE STATE AND LOCAL GOVERNMENTS TO ENTER INTO LONG-TERM PARTNERSHIPS WITH PRIVATE SECTOR PARTNERS TO FACILITATE EDUCATIONAL PROJECTS; PROVIDING POWERS AND DUTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be cited as the "Public-Private Partnerships Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the Public-Private Partnerships Act:

A. "department" means the higher education department;

B. "educational project" means a:

(1) building or other facility, together with

1 equipment, for providing educational services, including
2 renovations and improvements to an existing building or
3 facility; or

4 (2) program and equipment for providing
5 educational services at an existing building or facility;

6 C. "educational services" means academic
7 instruction for students as well as supportive services,
8 including counseling, medical, nutritional and recreational
9 services;

10 D. "force majeure" means an uncontrollable force or
11 natural disaster not within the power of the public or private
12 partner;

13 E. "local government" means a municipality; a
14 county; or a regional entity created by a joint powers
15 agreement between one or more public agencies;

16 F. "material default" means a failure of a private
17 partner to perform any duties under a public-private
18 partnership, which failure jeopardizes delivery of adequate
19 service to the public and remains unsatisfied after a
20 reasonable time and after the private partner has received
21 written notice from the public partner of the failure;

22 G. "private partner" means one or more persons who
23 have entered into a public-private partnership with a public
24 partner and who are not the federal government or any agency or
25 instrumentality of the federal government; another state or

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1 territory of the United States; a sovereign or foreign
2 government; or the state or an agency, branch, institution,
3 instrumentality or political subdivision of the state;

4 H. "public partner" means a local government, state
5 agency, state institution or instrumentality of the state;

6 I. "public-private partnership" means an agreement
7 between one or more public partners and one or more private
8 partners for the design, development, financing, construction,
9 operation or maintenance of an educational project;

10 J. "user fee" means a rate, fee or other charge
11 imposed by a partner for use of all or part of an educational
12 project; and

13 K. "utility" means a privately, publicly or
14 cooperatively owned line, facility or system for producing,
15 transmitting or distributing communications, cable television,
16 power, electricity, light, heat, gas, oil, crude products,
17 water, steam, waste, storm water not connected with highway
18 drainage or any other similar commodity, including a fire or
19 police signal system or street lighting system, which directly
20 or indirectly serves the public; but "utility" does not include
21 electric utilities and electric utility facilities that are
22 subject to regulation by the public regulation commission,
23 except for the purpose of addressing utility crossings pursuant
24 to Section 15 of the Public-Private Partnerships Act.

25 SECTION 3. [NEW MATERIAL] PROJECT DELIVERY METHODS--

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1 PROPOSALS.--A public partner may provide for the development of
2 an educational project using a variety of project delivery
3 methods, which methods shall be documented in written
4 agreements. The methods may include:

- 5 A. predevelopment agreements leading to other
6 implementing agreements;
- 7 B. design-build agreements;
- 8 C. design-bid-build agreements;
- 9 D. design-build-finance agreements;
- 10 E. construction manager at risk;
- 11 F. agreements that provide for the private partner
12 to design, build, manage, maintain, operate or lease an
13 educational project; or
- 14 G. other project delivery methods or agreements or
15 combination of methods or agreements that the public partner
16 determines is most advantageous to the public interest.

17 SECTION 4. [NEW MATERIAL] PROJECT DEVELOPMENT--
18 PROCUREMENT.--

- 19 A. A public partner may:
 - 20 (1) procure an educational project using any
21 of the following:
 - 22 (a) requests for proposals in which the
23 public partner describes a class of educational project or a
24 geographic area in which a person is invited to submit
25 proposals to develop an educational project;

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1 (b) solicitations using requests for
2 qualifications, short-listing of qualified proposers, requests
3 for proposals, negotiations or other procurement procedures;

4 (c) procurements seeking development and
5 finance plans that are most advantageous to the public partner
6 and suitable for the educational project;

7 (d) best-value selection procurements
8 based on price or financial proposals, or both, or other
9 factors; and

10 (e) other procedures that the public
11 partner determines may further the implementation of the
12 Public-Private Partnerships Act; and

13 (2) consider an unsolicited proposal if the
14 public partner determines that there is sufficient merit to
15 pursue the unsolicited proposal and a reasonable opportunity
16 for other persons to submit competing proposals for
17 consideration to ensure maximum competition among proposals
18 submitted and the best value for the public partner.

19 B. For a procurement in which the public partner
20 issues a request for qualifications or similar solicitation
21 document or following a public partner's decision to consider
22 an unsolicited proposal, the public partner shall issue a
23 request that sets forth the factors that will be evaluated and
24 the manner in which responses will be evaluated.

25 C. In evaluating proposals, the public partner, and

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1 the department if required, shall:

2 (1) consider a range of factors they deem
3 appropriate to obtain the best value for the state or local
4 government; and

5 (2) require specific justification and support
6 for a proposal that may affect:

7 (a) public employees' employment; or

8 (b) the cost of public service delivery.

9 D. The public partner may charge and retain a
10 reasonable administrative fee for the evaluation of an
11 unsolicited project proposal and for the cost of experts that
12 are consulted pursuant to Subsection E of this section;
13 provided that the administrative fee shall not exceed the
14 reasonable cost of evaluating the proposal.

15 E. The public partner shall consult with in-house
16 or contracted financial, legal, architectural or other experts
17 and advisors to assist in the design, evaluation, negotiation,
18 construction administration and development of public-private
19 partnership agreements for an educational project.

20 F. If contractor insurance is required for services
21 procured pursuant to this section, the insurance shall be
22 placed with an insurer authorized to transact insurance in New
23 Mexico or with a surplus lines insurer approved by the office
24 of superintendent of insurance or its successor agency.

25 G. In addition to making proposals available to the

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1 public pursuant to Subsection H of this section and providing
2 the opportunity for written comments from the public, the
3 public partner shall hold at least one public hearing and may
4 hold additional public hearings prior to entering into a
5 public-private partnership, all of which shall be preceded by
6 at least thirty days' notice. The meetings shall be subject to
7 the Open Meetings Act.

8 H. Each request for proposals issued pursuant to
9 the Public-Private Partnerships Act shall require the proposer
10 to include with its proposal an executive summary covering the
11 major elements of its proposal that do not address the
12 proposer's price, financing plan or other confidential or
13 proprietary information or trade secrets that the proposer
14 intends to be exempt from disclosure. Any unsolicited proposal
15 shall also include a similar executive summary. After the
16 public-private partnership is awarded and the conclusion of any
17 protest or other challenge to the award, the Inspection of
18 Public Records Act applies to any release of any part of the
19 proposals.

20 I. A solicited or unsolicited proposer shall
21 identify those portions of a proposal or other submission that
22 the proposer, with the public partner's concurrence, considers
23 to be a trade secret or confidential commercial, financial or
24 proprietary information. For trade secrets and confidential
25 and proprietary information to be exempt from disclosure, the

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1 proposer must do all of the following:

2 (1) invoke exclusion on submission of the
3 information or other materials for which protection is sought;

4 (2) identify with conspicuous labeling the
5 data or other materials for which protection is sought;

6 (3) state the reasons why protection is
7 necessary; and

8 (4) fully comply with any applicable state law
9 with respect to information that the proposer contends should
10 be exempt from disclosure.

11 J. A public partner shall consider a proposer's
12 request to withhold certain information in a proposal from
13 disclosure and shall issue a written determination either
14 accepting or rejecting the proposer's request. Following the
15 public partner's determination, any portions of the proposal
16 not withheld from disclosure shall be made available to the
17 public by request and the public partner shall maximize public
18 access to the disclosed portions of the proposal through
19 reasonable means available to the public partner.

20 SECTION 5. [NEW MATERIAL] PROCUREMENTS--RESTRICTIONS.--

21 A. The resident preferences provided in Sections
22 13-1-21 and 13-1-22 NMSA 1978 apply to procurements pursuant to
23 the Public-Private Partnerships Act. The construction of an
24 educational project is a public works for the purposes of the
25 Public Works Minimum Wage Act, the Subcontractors Fair

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1 Practices Act, any other provisions of Chapter 13, Article 4
2 NMSA 1978 and the Public Works Apprentice and Training Act.

3 B. Before it may be awarded, every public-private
4 partnership shall include an operating agreement that defines
5 the roles and responsibilities of the partners. The operating
6 agreement shall require that an educational project be operated
7 and maintained to the operating and maintenance standards and
8 specifications as set out in the agreement.

9 C. Should an educational project include building
10 maintenance, as to the maintenance activities, the public
11 partner or department shall not approve a project that
12 displaces an existing government employee unless the employee
13 is offered alternate equivalent employment.

14 SECTION 6. [NEW MATERIAL] DEPARTMENT--POWERS AND DUTIES--
15 ASSISTANCE WITH DUTIES.--

16 A. The department shall:

17 (1) in consultation with the state purchasing
18 agent, the department of finance and administration and any
19 other person that the department deems necessary, develop a
20 minimum set of guidelines to implement the provisions of the
21 Public-Private Partnerships Act, including the process that the
22 department shall follow with respect to the public-private
23 partnership agreements that the department is required to
24 review and approve and the information that is required to be
25 included in a requested or unsolicited proposal;

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1 (2) before a public-private partnership may be
2 established, review and approve all public-private partnership
3 agreements that include:

4 (a) a total educational project cost
5 that is greater than one million dollars (\$1,000,000); or

6 (b) a public-private partnership term
7 that is longer than five years;

8 (3) establish an evaluation process to
9 determine whether projects should be developed as public-
10 private partnerships or using traditional procurement and
11 funding methods prior to the initiation of contract
12 negotiations with a private partner;

13 (4) manage public communication and education,
14 including public hearings, regarding the scope, cost and
15 impacts of proposed public-private partnerships in order to
16 maximize the opportunity for public input on proposals;

17 (5) encourage maximum competition among
18 private entities to pursue the development and operation of
19 public-private projects in the state;

20 (6) serve as a resource for the legislature
21 and its staff regarding the policy and financial impacts of
22 proposals and the implications of proposed or pending
23 educational project agreements on the credit or other
24 obligations of the state;

25 (7) provide technical assistance to local

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1 governments and regional entities on the use of public-private
2 partnerships to meet their needs; and

3 (8) on or before December 1 of each year,
4 submit a report to the legislature on any pending, proposed or
5 completed public-private partnership agreements that the
6 department is required to review and approve. The report shall
7 specifically name the public-private project, its proposed
8 scope, the proposed finance plan, the status of permitting and
9 land acquisition and a summary of any educational project
10 agreements pending at the time of the report.

11 B. The department or a local government may:

12 (1) in accordance with Subsection D of Section
13 4 of the Public-Private Partnerships Act, retain, as necessary,
14 financial, legal and other experts to assist it in carrying out
15 its duties pursuant to the Public-Private Partnerships Act,
16 including assistance with the review of public-private
17 partnership agreements;

18 (2) solicit the expertise of state agencies,
19 state institutions, state instrumentalities and local
20 governments to assist the department or local government in
21 carrying out its duties pursuant to the Public-Private
22 Partnerships Act, including reviewing public-private
23 partnership proposals; and

24 (3) receive appropriations and money from any
25 other source, including other state agencies or local

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1 governments, regional organizations or the federal government,
2 to carry out its duties pursuant to the Public-Private
3 Partnerships Act.

4 C. All state agencies, state institutions, state
5 instrumentalities and local governments, as appropriate, shall
6 cooperate with the department or a local government and assist
7 it in carrying out its duties by providing technical
8 assistance, analysis and other services as requested by the
9 department or a local government.

10 SECTION 7. [NEW MATERIAL] DEPARTMENT--ADVICE AND
11 ASSISTANCE--REVIEW AND APPROVAL OF AGREEMENTS.--With respect to
12 public-private partnership agreements that the department is
13 required to review and approve, and before approving a public-
14 private partnership, the department shall:

15 A. assist the public partner in negotiating
16 agreements;

17 B. assist the public partner in preparing any
18 documents related to a specific agreement;

19 C. identify, and advise the public partner
20 regarding, any relevant federal securities or other laws and
21 related disclosure requirements; and

22 D. identify, and advise the public partner
23 regarding, accounting, investment and tax requirements
24 applicable to specific educational projects.

25 SECTION 8. [NEW MATERIAL] EVALUATION CRITERIA.--Before

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1 entering into a public-private partnership, the public partner,
2 and the department if required, shall consider:

3 A. the ability of the educational project to meet
4 the needs of the community in which it is to be located,
5 including improving and streamlining services to the public;
6 providing or enhancing educational, cultural and recreational
7 opportunities; promoting economic growth or job creation; or
8 otherwise serving a public purpose;

9 B. the proposed cost and financial plan for the
10 educational project;

11 C. the performance benchmarks contained in the
12 proposal;

13 D. the estimated operating costs of the educational
14 project;

15 E. the financial commitment of the private partner;

16 F. the risk of the proposed financing;

17 G. the general reputation, qualifications, industry
18 experience and financial capacity of the proposer;

19 H. the compatibility of the educational project
20 with local and regional land and water plans or other
21 infrastructure plans;

22 I. the feasibility and proposed design and
23 management of the educational project;

24 J. the degree of innovation; efficiency; and
25 technical, scientific, technological and socioeconomic merit of

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1 the proposal;

2 K. comments from potential users, local citizens,
3 affected jurisdictions and other interested persons;

4 L. benefits to the public, including improvements
5 in economic growth, job creation, public safety and quality of
6 life;

7 M. the safety record of the proposer;

8 N. efforts to be made through the public-private
9 partnership to retain and train New Mexico residents in
10 occupations and professions related to planning, design,
11 construction, project management, general management,
12 administration, legal, accounting and other areas of the
13 educational project over the life of the public-private
14 partnership;

15 O. the commitment to use New Mexico building
16 materials and manufactured goods and local services to the
17 extent possible;

18 P. green building design and construction
19 certification by a nationally recognized organization;

20 Q. innovations in energy efficiency or generation;
21 and

22 R. other criteria that the public partner and the
23 department deem appropriate for consideration.

24 SECTION 9. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP
25 AGREEMENTS--REQUIREMENTS.--

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1 A. In a public-private partnership, the public
2 partner, and the department with respect to public-private
3 partnership proposals that it reviews, shall require an
4 agreement to include provisions, as applicable, that:

5 (1) authorize the public partner or the
6 private partner to establish and collect user fees, rents,
7 advertising and sponsorship charges, service charges or other
8 charges allowed in the agreement, including provisions that:

9 (a) specify how revenue will be
10 collected, accounted for and audited;

11 (b) establish circumstances under which
12 the public partner may receive all or a share of revenue from
13 such charges; and

14 (c) govern enforcement of user fees,
15 including provisions for mechanisms to ensure that users are
16 identified and notified of fees owed and provisions that allow
17 the private partner access to information from relevant public
18 databases for enforcement purposes. Negligent use of the data
19 contained in the databases, including unauthorized disclosure
20 of the data, shall result in a civil penalty of ten thousand
21 dollars (\$10,000) for each violation;

22 (2) provide for a maximum negotiated rate of
23 return on the private partner's investment, including:

24 (a) fees and charges that may be
25 collected directly by the private partner or a third party

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1 engaged by the private partner for that purpose;

2 (b) a formula for the adjustment of user
3 fees and other charges during the term of the public-private
4 partnership;

5 (c) for an agreement that does not
6 include a formula described in Subparagraph (b) of this
7 paragraph, provisions regulating the private partner's return
8 on investment; or

9 (d) other strategies that the public
10 partner or the department deems appropriate;

11 (3) allow for payments to be made by the
12 public partner to the private partner, including availability
13 payments or performance-based payments;

14 (4) allow the public partner to accept
15 payments and share revenue with the private partner;

16 (5) address how the public and private
17 partners will share management of the risks of the educational
18 project;

19 (6) specify how the public and private
20 partners will share the costs of development of the educational
21 project;

22 (7) allocate financial responsibility for cost
23 overruns to the partner or partners that were responsible for
24 the cost overruns;

25 (8) establish the damages to be assessed for

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1 nonperformance;

2 (9) establish performance criteria or
3 incentives, or both;

4 (10) address the acquisition of property
5 interests that may be required, including provisions that allow
6 the public or private partner to acquire real property,
7 including acquisition by exchange of other real property that
8 is owned by the state, a local government or the federal
9 government;

10 (11) establish recordkeeping, accounting and
11 auditing standards to be used for the educational project;

12 (12) for an educational project with a term
13 that is longer than twenty-five years, address responsibility
14 for reconstruction or renovations that are required so that the
15 educational project meets all applicable government standards
16 before the educational project reverts to the public partner;

17 (13) provide for responsibilities for law
18 enforcement on educational projects;

19 (14) identify public partner specifications
20 that must be satisfied, including provisions allowing the
21 private partner to request and receive authorization to deviate
22 from the specifications on a showing satisfactory to the public
23 partner that the deviation is necessary;

24 (15) require a private partner to provide,
25 either directly or through the principal contractor who is in

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1 charge of the project, performance and payment bonds as
2 required by Section 13-4-18 NMSA 1978 for those components of
3 an educational project that involve construction. For
4 components that do not involve construction, require parent
5 company guarantees, letters of credit or other acceptable forms
6 of security or a combination of any of these, the penal sum or
7 amount of which may be less than one hundred percent of the
8 value of the contract involved based on the public partner's or
9 the department's determination of what is required to
10 adequately protect the public partner, made on a project-by-
11 project basis;

12 (16) provide clawback or recapture provisions
13 that protect the public investment; and

14 (17) specify remedies available to the parties
15 and dispute resolution procedures to be followed.

16 B. The public-private partnership agreement shall
17 include a clear statement of which partner will own any real
18 property pertaining to the educational project when the project
19 reverts to the public partner based on the terms of the
20 agreement.

21 C. The term of initial agreements entered into
22 pursuant to the Public-Private Partnerships Act may be for a
23 term not to exceed fifty years, and such agreements may be
24 extended for additional terms; provided that an extension shall
25 be subject to the same review and negotiation process as the

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1 original agreement.

2 D. The public-private partnership agreement shall
3 contain a provision by which the private partner expressly
4 agrees that it is prohibited from seeking injunctive or other
5 equitable relief to delay, prevent or otherwise hinder the
6 public partner or any other jurisdiction from developing,
7 constructing or maintaining an educational project that was
8 planned and that would or might affect the revenue that the
9 private partner would or might derive from the educational
10 project developed pursuant to the Public-Private Partnerships
11 Act, except that the agreement may provide for reasonable
12 compensation to the private partner for the adverse effect
13 resulting from development, construction and maintenance of an
14 unplanned facility that affects the educational project's
15 revenue.

16 E. The state board of finance shall approve the
17 assignment, transfer or sale of assets or investment in an
18 educational project that creates debt obligation of the public
19 partner.

20 SECTION 10. [NEW MATERIAL] FUNDING AND FINANCING.--

21 A. Any lawful source of funding may be used for the
22 development or management of an educational project pursuant to
23 the Public-Private Partnerships Act, including:

24 (1) proceeds of grant anticipation revenue
25 bonds, private activity bonds, revenue bonds or other bonds

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1 allowed by federal or state law;

2 (2) grants, loans, loan guarantees, lines of
3 credit, revolving lines of credit or other arrangements as
4 allowed by federal or state law;

5 (3) other federal, state or local revenues;

6 (4) user fees, lease payments, availability
7 payments, gross or net receipts from sales, proceeds from the
8 sale of development rights, franchise charges, permit charges,
9 advertising and sponsorship charges, service charges or any
10 other lawful form of consideration; and

11 (5) other forms of public and private capital
12 that are available.

13 B. As security for the payment of financing
14 described in this section, the revenues from the educational
15 project may be pledged, but no pledge of revenues or property
16 constitutes in any manner or to any extent a general obligation
17 of the state or local government, unless explicitly agreed to
18 by the state or local government. Financing may be structured
19 on a senior, parity or subordinate basis to any other
20 financing.

21 C. The public partner may accept money from the
22 United States or any of its agencies to carry out the
23 provisions of the Public-Private Partnerships Act, whether the
24 money is made available by grant, loan or other financing
25 arrangement. The public partner assents to any federal

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1 requirements, conditions or terms of any federal funding
2 accepted by the public partner pursuant to this subsection.
3 The public partner may enter into agreements or other
4 arrangements with the United States or any of its agencies as
5 may be necessary to carry out the provisions of that act.

6 D. The public partner may accept from any source
7 any grant, donation, gift, conveyance of land, other real or
8 personal property or other thing of value made to the public
9 partner for the purposes of an educational project.

10 E. An educational project may be funded in whole or
11 in part by contributions of money or property made by a private
12 person, a private entity or the state or any agency,
13 institution, instrumentality or political subdivision of the
14 state.

15 F. Federal, state and local money may be combined
16 with private sector money for educational project purposes as
17 allowed by law or by the grant, gift or donation provisions.

18 G. Any revenue bonds issued as a result of the
19 Public-Private Partnerships Act are not general obligations of
20 this state or any local government and are not secured by or
21 payable from any money or assets of the state or any local
22 government other than the money and revenues specifically
23 pledged to the repayment of the revenue bonds.

24 SECTION 11. [NEW MATERIAL] USER FEES AT END OF AGREEMENT
25 PERIOD.--The public partner may continue or cease collection of

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1 user fees after the end of the term of the public-private
2 partnership agreement, based on a determination of the
3 educational project's future operations.

4 SECTION 12. [NEW MATERIAL] REVERSION OF EDUCATIONAL
5 PROJECT TO PUBLIC PARTNER.--If the public-private partnership
6 is terminated, the powers and duties of the private partner
7 cease, except for any duties and obligations that extend beyond
8 the termination as provided in the public-private partnership
9 agreement, and the educational project reverts to the public
10 partner and shall be dedicated for public use.

11 SECTION 13. [NEW MATERIAL] MATERIAL DEFAULT--REMEDIES.--

12 A. Upon the occurrence and during the continuation
13 of material default by the private partner, not related to an
14 event of force majeure, the public partner may:

15 (1) elect to take over the educational
16 project, including the succession of all right, title and
17 interest in the educational project, subject to any liens on
18 revenue previously granted by the private partner; and

19 (2) terminate the public-private partnership
20 and exercise any other rights and remedies that may be
21 available.

22 B. If the public partner elects to take over an
23 educational project pursuant to Subsection A of this section,
24 the public partner:

25 (1) shall collect and pay any revenue that is

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1 subject to lien to satisfy an obligation;

2 (2) may develop and operate the educational
3 project, impose user fees for the use of the educational
4 project and comply with any service contracts; and

5 (3) may solicit proposals for the maintenance
6 and operation of the educational project as provided in the
7 Public-Private Partnerships Act for original proposals.

8 SECTION 14. [NEW MATERIAL] POLICE POWERS--VIOLATIONS OF
9 LAW.--All law enforcement officers of the state or local
10 government have the same powers and jurisdiction within the
11 limits of the educational project as they have in their
12 respective areas of jurisdiction and access to the educational
13 project at any time to exercise such powers and jurisdictions.

14 SECTION 15. [NEW MATERIAL] UTILITY CROSSINGS.--Subject to
15 the requirements of federal and state laws, contractual
16 agreements and land conveyance documents, a public or private
17 partner and any utility whose facility is to be crossed or
18 relocated shall cooperate fully in planning and arranging the
19 manner of the crossing or relocation of the utility facility.

20 SECTION 16. EFFECTIVE DATE.--The effective date of the
21 provisions of this act is July 1, 2017.